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5 Attorney for Defendants, Jose Eduardo Pavon and Jennifer Anne Von Bima  
6

7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9

10  
11 Heritage Pacific Financial LLC, ) Case No.SACV09-01466AG (RNbx)  
12 DBA Heritage Pacific Financial, )  
13 A Texas Limited Liability Company, ) **DEFENDANTS' NOTICE OF MOTION,**  
Plaintiff, ) **AND MOTION TO SET ASIDE DEFAULT**  
vs. ) **(F.R.C.P. 55 (C) AND 60 (B) AND**  
James Hague, Charlene Chao; Jeffrey ) **MOTION TO SEVER (F.R.C.P. 20 (a) and**  
Tomazin, Priscilla Tomazin; Maria Soila ) **21)**  
Carabajal, Ephraim Kiama, Evie Liwe, James ) **Date: May 10, 2010**  
Taylor, Remus Eppie, Patrick Ogden, Silvia ) **Time: 10:00 a.m.**  
Elizabeth Salmeron, Veronica Conklin, Emilia ) **Courtroom: 10 D**  
Villarreal, Moradali Amirinegar, Martha )  
Rocha, Mina Shahab, Myra Popp Figueroa, )  
Victor Bonilla, Leticia Valenzuela, Antonia )  
Pedraza, Bonnie Rhea Scott, Alberto Pasillas, )  
Jorge Velasco, Jennie Arismendez, Paul )  
Radwich, Mary Pearson, Ronald Calvero, Jose )  
Eduardo Pavon, Jennifer Anne Von Bima, )  
Fred Ortiz, Jorge Mora, Sonia Navarro, )  
Monique Heredia, Otila Murrietta, Gelenie )  
Quiocho Amigable, Amanda Espinello, )  
Claudia Tovar, Sergio Tovar, Bertha Cortes, )  
Miguel Cortes Ferral, Jorge Siguenza, Blanca )  
Rodas, Sean Wolfswinkel, Alfredo Jimenez, )  
Eloisa Peneda, Levis Rodrigues, Monica )  
Anguiano, Salomon Solis, Monique Huereque, )  
Lourdes Velazques, )  
Defendants )

1  
2 TO THE CLERK OF THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF  
3 RECORD:  
4

5 PLEASE TAKE NOTICE that on May 10, 2010 at 10:00 a.m., or as soon thereafter as the  
6 matter may be heard in Courtroom 10-D of the above entitled court located at 411 West Fourth  
7 Street, Santa Ana, California 92701-4516, Defendants, JOSE EDUARDO PAVON and  
8 JENNIFER VON BIMA will move the court pursuant to *Federal Rules of Civil Procedure* Rule  
9 55 (c), 60(b), and 21 for an order setting aside the default, and severing this case from all other  
Defendants.

10 The motion will be based on the attached Notice of Motion, Memorandum of Points and  
Authorities and written documents filed with the court, and oral arguments of counsel.  
11

12 Dated: April 7, 2010 Law Offices of Marilyn S. Yee  
13

14 By Marilyn S. Yee  
15 Marilyn S. Yee  
16 Attorney for Defendants, Jose Eduardo Pavon  
And Jennifer Von Bima  
17

18 MEET AND CONFER COMPLIANCE

19 I) On January 25, and February 2, 2010, I requested an extension of time to respond  
20 to Plaintiff's complaint, in order that we could conduct our due diligence to confirm that  
21 Plaintiff owns the debt that is allegedly owed by Defendants.  
22

23 Counsel did not respond to my requests, and entered Defendants' default on February  
24 1, 2010. On February 2, 2010, I faxed counsel a written request to set aside the default.  
25 Counsel responded by serving Defendants a notice to appear at a hearing to enter a default  
26 judgment. The hearing was vacated due to the Plaintiff's filing of insufficient pleadings, and  
27 notice was not timely. Counsel for Plaintiff continues to refuse to set aside the default.  
28

1 II) On or about February 23, 2010, Mike Corfield was substituted for Justin Ryan, as  
2 Plaintiff's counsel. Mr. Corfied agreed to stipulate to set aside the default, and a stipulation was  
3 faxed to Mr. Corfield's office on February 24, 2010.  
4

5 III. An email was sent by Mr. Corfield on March 3, 2010, advising that he was substituting out of  
6 the case, and that Brad Mokri was the new counsel. Mr. Mokri then agreed on March 8, 2010,  
7 that he would execute a stipulation to set aside the default, as soon as his substitution was  
8 processed, and a stipulation was faxed to Mr. Mokri on March 15, 2010.  
9

10 III. As of the current date no stipulation from any of the above counsel has been executed as  
11 agreed.  
12

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 A. History of the Case

15 The lender, Metropolitan Bancorp, hereafter "Metropolitan" held a loan secured by a  
16 first deed of trust for \$476,000, and the loan that is the subject of this action, for \$119,000  
17 secured by a second deed of trust on the property located at 2257 Riverdale Avenue, Los  
18 Angeles, California 90031. Metropolitan, pursuant to the power of sale under the first deed of  
19 trust, sold the subject property at a trustee's sale in May 2008. Defendants were served with  
20 this complaint on December 30, 2009.  
21

22 Defendants executed a loan application that contained certain financial information  
23 relating to their debt and income. The pages of the loan application after the application was  
24 executed by Defendants, relating to income were replaced by the loan agent, Miguel Mario  
25 Gutierrez, with false information without Defendants' consent and knowledge. Further the  
26 loan payments were to be made by Joaquin Serrano, and Luz Maria Guzman, who resided in  
27  
28

1 the subject property. Title to the subject property was later transferred to the children of  
2 Joaquin Serrano, who are Winfred Serrano, and Anna Christine Rojas.  
3

4 Defendants received documents from Plaintiff on January 21, 2010. Defendants were  
5 unable to verify that Plaintiff was the successor in interest to the original lender, During the  
6 period from January 21, 2010 to February 4, 2010, Plaintiff and Defendants had a continuing  
7 dialog concerning the issues in this case. Defendant's Counsel requested extensions of time  
8 to respond to the complaint. Defendants' counsel sent written requests to Plaintiffs counsel  
9 on January 25, 2010 and February 2, 2010. Plaintiff's counsel did not respond and entered  
10 Defendant's default on February 1, 2010. Plaintiff's counsel attempted to enter a default  
11 judgment by serving Defendants with notice that a hearing was calendared on February 8,  
12 2010. The hearing was vacated by the court due as the pleadings were insufficient, and  
13 timely notice was not given by Plaintiff for the hearing.  
14

15       B. Argument for Set Aside of Default

16       1. Defendant's Failure to Answer was not Willful.

17       Defendants were served with the complaint on December 30, 2009. They were in  
18 contact with Plaintiff after they were served to discuss resolving the allegation in the  
19 complaint. Plaintiff retained counsel on January 21, 2010, and counsel requested an  
20 extension of time while they were attempting to conduct their due diligence. The main  
21 problem was that Plaintiffs were not able to verify that they owned the debt allegedly owed  
22 by Defendants. Further, the parties who are responsible for the allegations contained in the  
23 complaint are other parties who have not been named in this action. Defendants intend to file  
24 a Third Party Complaint, against the parties who caused Plaintiff's damages. A draft of the  
25 proposed Third Party Complaint is attached to this motion as Exhibit 3.  
26  
27  
28

1 Defendants and their counsel mistakenly believed that Plaintiff would not enter their  
2 default during the 2 week period that Defendants were conducting their due diligence and  
3 engaging in their discussions with Plaintiff.  
4

5 2. Rule 55 ( c ) and 60 ( b ) Should be Liberally Construed to Allow Set Aside of  
6 Default.

7 Rule 55 ( c ) of the *Federal Rules of Civil Procedure*, provide in relevant part:

8 “The court may set aside an entry of default for good cause, and it may set aside a  
9 default judgment under 60 (b).”

10 Rule 60 ( b ) of the *Federal Rules of Civil Procedure* provide in relevant part:

11 “Grounds for Relief from a Final Judgment, Order, or Proceeding.

12 On motion and just terms, the court may relieve a party or its legal representative  
13 from a final judgment, order, or proceeding for the following reasons:

- 14 (1) mistake, inadvertence, surprise, or excusable neglect;
- 15 (2) newly discovered evidence that, with reasonable diligence, could not have  
16 been discovered in time to move for a new trial under Rule 59(b);
- 17 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or  
18 misconduct by an opposing party;
- 19 (4) the judgment is void;
- 20 (5) the judgment has been satisfied, released, or discharged; it is based on an  
21 earlier judgment that has been reversed or vacated; or applying it prospectively is  
22 no longer equitable; or
- 23 (6) any other reason that justifies relief.

24 In the case at hand, the default should be set aside on the basis of excusable neglect.

25 Plaintiff's counsel did not respond to Defendants' counsel's numerous requests for an  
26 extension of time to respond to the complaint. Counsel mistakenly believed that Plaintiff  
27 would not enter a default while Defendant was attempting to verify that Plaintiff was the  
28

1 successor in interest to the original lender, and that Plaintiff had standing to make the  
2 allegations contained in the complaint.  
3

4 **3. No Prejudice to Plaintiff will Result if Default is Set Aside.**  
5

6 This action is in its early stages, as the complaint was recently filed on December 11,  
7 2009. No prejudice will result to Plaintiff if the default is set aside. Only a default has  
8 been entered, and no judgment yet has been entered. For that reason the standard of  
9 review is especially broad where a default is set aside, as opposed to a default judgment.  
10 See Brady vs. US (2000) 211 F. 3d 499. A copy of the Defendants' proposed Answer is  
11 attached as Exhibit 1.  
12

13  
14 **4. The Default Should be Set Aside for the Reason that Defendants Have Several**  
15 **Meritorious Defenses.**  
16

17 Several defenses to the allegations of Plaintiff exist in favor of Defendants. The  
18 damages alleged by Plaintiff were cause by third parties who are named as third party  
19 defendants. A copy of the Third Party Complaint is attached as Exhibit 2. Where Defendants  
20 have a meritorious defense, it is proper for the court to resolve the matter in favor of a set  
21 aside of the default. See In Re Hammer (9<sup>th</sup> Cir. 1991) 940 Fed 2d 524.  
22

23 Defendants also have a basis on which to allege counterclaims against Plaintiff. A  
24 copy of the Counterclaim is attached as Exhibit 3.  
25

**C. Argument for Sever of Defendants' Case from Main Action**  
26

27 Plaintiff has improperly joined more than 50 defendants in this action, many of whom  
28 were not involved in the same transaction, or series of transactions.  
29

1 Rule 20 (A) of the *Federal Rules of Civil Procedure* provides:

2 "any right to relief is asserted against them jointly, severally, or in the alternative with  
3 respect to or arising out of the same transaction, occurrence, or series of transactions or  
4 occurrences; "

5 Rule 21 *Federal Rules of Civil Procedure* provides in relevant part:

6 "On motion or on its own, the court may at any time, on just terms, add or drop a  
7 party. The court may also sever any claim against a party."

8 In the case at hand, Plaintiff is attempting to join Defendants in a single action that  
9 have no common facts, witnesses, or documents, and concern unrelated transactions, multiple  
10 parties, and separate parcels of real property.

11 The court found a gross abuse of procedure where thousands of unrelated transactions  
12 were joined in a single case. See Nassau Co. Association of Insurance Agents vs. Aetna Life  
& Casualty Co. (1974) 497 F2d 1151.

13 Further, even though a case is brought under the same general law, this fact alone  
14 does not establish a common question of law and fact. The court in Coughlin vs. Rogers  
15 (1997) 130 F3d 1348, found that the interest of justice was not served, trial efficiency was  
16 not promoted, and there were no common questions of law or fact, where 39 Plaintiffs  
17 brought a single action against the Immigration and Naturalization Service, hereafter "INS".  
18 Despite the common allegation of a lack of timeliness on the part of INS, the court found that  
19 joining the multiple parties was improper, and that the allegations of Plaintiffs did not arise  
20 out of the same transactions or a series of transactions.  
21

22 D. Conclusion  
23  
24  
25  
26  
27  
28

1           Based on the foregoing authority, the default should be set aside, in order that  
2           Defendants may file their Answer, Counterclaim, and Third Party Complaint. Further,  
3           Defendants' case should be severed, and with a separate trial to be held on the merits. The  
4           filing of this action against 50 defendants in a single action is improper, as there are no  
5           common questions of law and fact, and this action did not arise out the same transaction or a  
6           series of transactions.

7  
8           Respectfully Submitted.  
9  
10

11           Dated: April 7, 2010

Law Offices of Marilyn S. Yee

12           By Marilyn S. Yee

13           Marilyn S. Yee

14           Attorney for Defendants, Jose Eduardo Pavon  
And Jennifer Anne Von Bima

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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9

10  
11 Heritage Pacific Financial LLC, ) Case No.SACV09-01466AG (RNBx)  
12 DBA Heritage Pacific Financial, )  
13 A Texas Limited Liability Company. ) ANSWER TO COMPLAINT  
14 Plaintiff. )  
15 vs. )  
16 James Hague, Charlene Chao; Jeffrey )  
17 Tomazin, Priscilla Tomazin; Maria Soila )  
18 Carbajal, Ephraim Kiama, Evie Liwe, James )  
19 Taylor, Remus Eppie, Patrick Ogden, Silvia )  
20 Elizabeth Salmeron, Veronica Conklin, Emilia )  
21 Villarreal, Moradali Amirinegar, Martha )  
22 Rocha, Mina Shahab, Myra Popp Figueroa. )  
23 Victor Bonilla, Leticia Valenzuela, Antonia )  
24 Pedraza, Bonnie Rhea Scott, Alberto Pasillas, )  
25 Jorge Velasco, Jennie Arismendez, Paul )  
26 Radwich, Mary Pearson, Ronald Calvero, Jose )  
27 Eduardo Pavon, Jennifer Anne Von Bima, )  
28 Fred Ortiz, Jorge Mora, Sonia Navarro, )  
Monique Heredia, Otila Murrietta, Gelenie )  
Quiocho Amigable, Amanda Espinello, )  
Claudia Tovar, Sergio Tovar, Bertha Cortes. )  
Miguel Cortes Ferral, Jorge Siguenza, Blanca )  
Rodas, Sean Wolfswinkel, Alfredo Jimenez, )  
Eloisa Peneda, Levis Rodrigues, Monica )  
Anguiano, Salomon Solis, Monique Huereque, )  
Lourdes Velazques.  
Defendants

1  
2 COMES NOW, DEFENDANTS, Jose Eduardo Pavon and Jennifer Anne Von Bima answering  
3 the complaint as follows:  
4

- 5 1. In response to paragraphs 1, 2, and 3 a-z, aa, cc-vv of the complaint, Defendants lack  
6 sufficient information to respond to these allegations and on that basis deny each and  
7 every, generally and specifically, the allegations contained in the complaint.
- 8 2. Defendants deny each and every, generally and specifically, the allegations contained in  
9 paragraphs 4,6, and 7 of the complaint.
- 10 3. In response to paragraph 5 of the complaint, Defendants lack sufficient information to  
11 respond to this allegation and on that basis denies each and every, generally and  
12 specifically, the allegation contained in the complaint.
- 13 4. Defendants deny each and every, generally and specifically, the allegations contained in  
14 paragraphs 8,9,10,11, and 12 a-c, of the complaint.
- 15 5. Defendants deny each and every, generally and specifically, the allegations contained in  
16 paragraphs 13,14,16,17,18, and 19 of the complaint.
- 17 6. In response to paragraphs 20,21,22,23,24,25,26,27,28,29,30,  
18 31,32,33,34,35,36,37,38,39,40,41,42,43,44,45,46,47,49,50,51,5253,54,55,56,57,58,59,60,61,  
19 62,63,64 and 65 of the complaint, Defendants lack sufficient information to respond to this  
20 allegation and on that basis denies each and every, generally and specifically, the allegation  
21 contained in the complaint
- 22 7. Defendants deny each and every, generally and specifically,  
23 the allegations contained in paragraph 48 of the complaint.
- 24 8. In response to paragraphs 66,67,68,69, 70-a,b, and 71, Defendants lack sufficient  
25 information to respond to this allegation and on that basis denies each and every, generally  
26 and specifically, the allegation contained in the complaint
- 27 9. In response to paragraphs 72,73,74,75,76,77,78,79,80, and 81, as alleged against  
28 Defendants, Defendants deny each and every, generally and specifically, the allegations  
contained in these paragraphs in the complaint. In addition, Defendants lack sufficient

1 information to respond on behalf of all co-defendants, and on that basis deny each and every,  
2 generally and specifically, the allegations contained in these paragraphs of the complaint.

3 10. Defendants deny each and every, generally and specifically, the allegations contained in  
4 paragraph 82,83,84,85,86,87,88 of the complaint. In response to these paragraphs of the  
5 subject action, Defendants lack sufficient information to respond on behalf of all other  
6 Defendants named in this action, and on that basis denies each and every, generally and  
7 specifically, the allegations contained in the complaint.

8  
9 11. Defendants deny each and every, generally and specifically, the allegations contained in  
10 paragraph 89,90,91,92,93,94, and 95, of the complaint. In response to these paragraphs of the  
11 subject action, These answering Defendants lack sufficient information to respond on behalf  
12 of all other Defendants named in this action, and on that basis denies each and every,  
13 generally and specifically, the allegations contained in the complaint.

14 12. In response to paragraphs 96 a-aa, and 96 cc-tt, Defendants lack sufficient information to  
15 respond to the allegations and on that basis deny each and every, generally and specifically,  
16 the allegations contained in the complaint.

17 13. Defendants deny each and every, generally and specifically, the allegations contained in  
18 paragraph 96(bb), of the complaint.

19  
20 AFFIRMATIVE DEFENSES

21  
22 FIRST AFFIRMATIVE DEFENSE

23 14. Plaintiff has improperly joined multiple Defendants in this action, where no common  
24 questions of fact exist between Defendants, and the action does not arise out of the same  
transaction or occurrence in violation of Rule 20 of the Federal Rules of Civil Procedure.

25  
26 SECOND AFFIRMATIVE DEFENSE

27 15. These answering Defendants allege that Plaintiff failed to allege facts sufficient to constitute  
a cause of action upon which relief can be granted against the Defendants.

28  
29 THIRD AFFIRMATIVE DEFENSE

30 16. Any damages suffered by the Plaintiff were caused by its own actions and negligence.

1    FOURTH AFFIRMATIVE DEFENSE

2    17. As a separate and affirmative defense, these answering Defendants are informed and  
3 believe and on that basis allege that Plaintiff, and/or its agents, and/or parties not yet identified,  
4 spoiled evidence and as a result, Defendants have been deprived of access to said evidence and  
5 the ability to defend herself by Plaintiff's conduct.

6    FIFTH AFFIRMATIVE DEFENSE

7    18. Plaintiff consented expressly or impliedly to the acts alleged in the complaint and on that  
8 basis is barred from recovery.

9    SIXTH AFFIRMATIVE DEFENSE

10    19. These answering Defendants allege that Plaintiff's recovery is barred by the statute of  
11 limitations.  
12    :

13    SEVENTH AFFIRMATIVE DEFENSE

14    20. As a separate and affirmative defense, Defendants allege that Plaintiff failed to act in a  
reasonable time to mitigate its alleged damages sustained.

15    EIGHTH AFFIRMATIVE DEFENSE

16    21. As a separate and affirmative defense, this answering Defendants allege that Plaintiff's  
17 causes of actions are barred by the doctrine of unclean hands.

18    NINTH AFFIRMATIVE DEFENSE

19    22. These answering Defendants allege that Plaintiff's causes of action are barred by the  
20 doctrine of laches.

21    TENTH AFFIRMATIVE DEFENSE

22    23. As a separate and affirmative defense, these answering Defendants allege that any damages  
23 suffered by Plaintiff was caused by the negligence, or intentional conduct of other persons or  
24 entities for whom these Defendants are not responsible.

25    ELEVENTH AFFIRMATIVE DEFENSE

26    24. Plaintiff's action is barred by the anti-deficiency rules.

27    WHEREFORE, Defendant prays as follows:

28    As to all Causes of Action:

1. That Plaintiff take nothing by way of its complaint;

- 1        2. For costs of suit, including reasonable attorney's fees;
- 2        3. For such other and further relief as the court deems proper.

3              Dated: April 7, 2010

4              Law Offices of Marilyn S. Yee

5  
6              By Marilyn S. Yee

7              Marilyn S. Yee

8              Attorney for Defendants, Jose Eduardo Pavon  
And Jennifer Von Bima

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5 Attorney for Defendants, Jose Eduardo Pavon and Jennifer Anne Von Bima  
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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9  
10

11 Heritage Pacific Financial LLC, ) Case No.SACV09-01466AG (RNBx)  
12 DBA Heritage Pacific Financial, )  
13 A Texas Limited Liability Company. ) **DEFENDANTS' COUNTERCLAIM**  
Plaintiff. ) **DAMAGES, AND EQUITABLE RELIEF**  
14 vs. ) **FOR:**  
15 James Hague, Charlene Chao; Jeffrey )  
Tomazin, Priscilla Tomazin; Maria Soila )  
16 Carbajal, Ephraim Kiama, Evie Liwe, James ) **1. PREDATORY LENDING**  
Taylor, Remus Eppie, Patrick Ogden, Silvia ) **2. BREACH OF GOOD FAITH & FAIR**  
17 Elizabeth Salmeron, Veronica Conklin, Emilia ) **DEALING**  
Villarreal, Moradali Amirinegar, Martha ) **3. DECLARATORY RELIEF**  
18 Rocha, Mina Shahab, Myra Popp Figueroa, ) **4. ACCOUNTING**  
Victor Bonilla, Leticia Valenzuela, Antonia )  
Pedraza, Bonnie Rhea Scott, Alberto Pasillas. )  
Jorge Velasco, Jennie Arismendez, Paul )  
Radwich, Mary Pearson, Ronald Calvero, Jose )  
Eduardo Pavon, Jennifer Anne Von Bima, )  
Fred Ortiz, Jorge Mora, Sonia Navarro, )  
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Rodas, Sean Wolfswinkel, Alfredo Jimenez, )  
Eloisa Peneda, Levis Rodrigues, Monica )  
Anguiano, Salomon Solis, Monique Huereque, )  
Lourdes Velazques. )  
Defendants )

1  
2 Jose Eduardo and Jennifer Anne Von Bima, )  
3 Individuals, )  
4 )  
5 Counter-Claimants )  
6 Vs. )  
7 )  
8 Heritage Pacific Financial LLC, DBA )  
9 Heritage Pacific Financial, a Texas Limited )  
10 Liability Company, and Does 1 through 5, )  
11 )  
12 Counter-Defendants )  
13 )  
14 \_\_\_\_\_

15 COMES NOW, COUNTER-CLAIMANTS, JOSE EDUARDO PAVON and JENNIFER  
16 ANNE VON BIMA, INDIVIDUALS, alleges damages and seeks equitable relief against,  
17 COUNTER-DEFENDANTS, AS FOLLOWS:

18 A. JURISDICTION AND PARTIES

- 19 1. At all times herein mentioned, Counter-Claimants, Jose Eduardo Pavon and Jennifer Anne  
20 Von Bima, hereafter referred to as "Pavon" were residents of the County of Riverside.  
21  
22 2. Pavon is informed and believes and on that basis alleges, that Counter-Defendants, Heritage  
23 Pacific Financial, LLC, hereafter referred to as "Heritage", was a limited liability company  
24 organized under the laws of the State of Texas, with its principal place of business in Dallas,  
25 Texas.  
26  
27 3. Pavon entered into the transaction described herein, with Metropolitan Bancorp. Heritage  
28 alleges that it is the owner of the debt owed by Pavon, as the successor in interest to  
Metropolitan Bancorp, hereafter referred to as "Bancorp".  
29  
30 4. At all times herein mentioned, the real property which is the basis of this action is located at  
31 2257 Riverdale Avenue, Los Angeles, California 90031.

1       5. Venue of this court is proper on the basis of diversity, as Pavon and Heritage are citizens of  
2 different states.  
3

4 **B. HISTORY OF THE CASE**

5       6. Pavon obtained a loan with the lender, Bancorp, secured by a first deed of trust for \$476,000,  
6 and a loan that is the subject of this action, for \$119,000 secured by a second deed of trust on the  
7 property located at 2257 Riverdale Avenue, Los Angeles, California 90031. Bancorp, pursuant to  
8 the power of sale under the first deed of trust, sold the subject property at a trustee's sale in May  
9 2008. Pavon was served with this complaint on December 30, 2009.  
10

11       7. Pavon did not reside in the subject property, but was seeking to assist his family members who  
12 were Joaquin G. Serrano and Luz Maria Veronica Guzman, hereafter collectively referred to as  
13 "Serrano", by securing the financing. Serrano agreed to reside in the property, and to make all of  
14 the loan payments on the first and second mortgages. Serrano further advised Pavon that the  
15 subject financing was for a short term re-finance, and that a new loan would be placed on the  
16 property in 6 months, and that Pavon would no longer be the borrower. After the escrow closed  
17 Pavon became aware that the transaction was for the purchase of the subject property and was  
18 not for a refinance.  
19

20       8. Pavon executed a Uniform Residential Loan Application, Form 1003, that contained certain  
21 financial information relating to their debt and income. The pages of the loan application after  
22 the application was executed by Pavon, relating to income were replaced by the loan agent,  
23 Miguel Mario Gutierrez, with false information without Pavon's consent and knowledge. Further  
24 the loan payments were to be made by Joaquin Serrano, and Luz Maria Guzman, who resided in  
25 the subject property. Title to the subject property was later transferred to the children of Joaquin  
26 Serrano, who are Winfred Serrano, and Ana Christina Rojas.  
27  
28

1 9. Pavon submitted supporting documents for the loan application to the lender, which included  
2 employment pay stubs, and bank statements.  
3

4 **C. GENERAL ALLEGATIONS**

5 10. Pavon realleges, as though fully set forth herein, the allegations contained in paragraphs 1  
6 through 5 of this counterclaim.

7 11. Pavon is informed and believes and on that basis allege that Heritage, as the successor of  
8 Metropolitan, at all times herein mentioned was employed by or the agents of Metropolitan , and  
9 were acting within the course and scope of the agency or employment in doing the acts as  
10 alleged.

11 **FIRST CLAIM FOR RELIEF**  
12 (Predatory Lending)

13 12. Pavon realleges and incorporates by reference as though fully set forth herein, the allegations  
14 contained in paragraphs 1 through 11 of this counterclaim.

15 13. This was a stated income loan. The income erroneously stated that \$15,000 a month was  
16 earned by Pavon. Pavon owned another property, at the time that this loan was approved. Pavon  
17 submitted pay stubs and bank statements that clearly stated his and his spouse's income. The risk  
18 factors relating to the subject loan, of the borrowers was obvious; which include: stated income  
19 documentation, and a lack of determination regarding the ability to repay the loan. The loan  
20 should have required strict underwriting standards. Pavon was employed by a tile store, and was  
21 not the owner as represented, and the amount of income fraudulently stated on their loan  
22 application was \$180,000 annually. Heritage, and its predecessor, Bancorp, made no attempts to  
23 determine the true ability of Pavon to repay the loan, which was a total of \$476,000 on the first  
24 mortgage and \$119,000 on the second mortgage, for a total of \$595,000 on top of other loans  
25  
26  
27  
28

1 held by Pavon for their other real property and autos. The imprudent underwriting described  
2 above violated 12 C.F.R. 226.34(a)(4).

3  
4 14. Pavon is informed and believes and thereon alleges that Bancorp, and Heritage targeted low  
5 income and minority borrowers for its campaign of its predatory lending practices.

6  
7 15. As a result of these predatory lending practices, Pavon was at high risk of foreclosure of his  
8 property, and suffered damage as a result of these lending practices herein described.

9  
10 16. Pavon is informed and believes and on that basis alleges that despite having a high FICO  
11 credit score in the 700's, Pavon was charged a very high interest rate of 6.99 % on the loan for  
12 the first mortgage and 10.6% for the second mortgage.

13  
14 17. Pavon is entitled to damages according to proof, including reasonable attorneys' fees,  
15 suffered as a result of Counter-Defendants' predatory lending practices.

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**SECOND CLAIM FOR RELIEF**  
**( Breach of Good Faith and Fair Dealing)**

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22  
23 18. Pavon realleges and incorporates by reference, as though fully set forth herein, the  
24 allegations contained in the preceding paragraphs.

25  
26  
27 19. At all pertinent times, the agreement entered into between Pavon and Heritage contained an  
28 implicit covenant of good faith and fair dealing requiring Heritage and Bancorp to act honestly  
and in good faith in the performance and enforcement of the contract.

29  
30  
31 20. The conduct of Heritage and Bancorp, in purposefully overstating Pavons' income and  
32 failing to disclose material information in the loan application process, constitutes a breach of  
33 covenant of good faith and fair dealing, as required by *California Civil Code Section 2971*.

34  
35  
36 21. Pavon is informed and believes and thereon alleges that as a result of the Heritage and  
37 Bancorp's conduct Pavon has suffered economic damages in an amount in excess of  
38 \$1,000,000.00 or to be proven at trial.

39  
40  
41 22. Heritage and Bancorp committed the acts herein alleged maliciously, fraudulently, and  
42 oppressively, with reckless disregard of the Pavons' rights. Conduct by the Heritage and Bancorp

amounted to malice and was carried out in a despicable, deliberate, cold, callous, and intentional manner thereby entitling Pavon to recover punitive damages from Defendant in an amount according to proof.

23. The terms of the subject promissory note, at paragraph 4(d), provide for costs, including reasonable attorneys' fees. Pavon seeks compensation for their attorneys' fees according to proof.

**THIRD CLAIM FOR RELIEF**  
**(Declaratory Relief)**

24. Pavon realleges and incorporates by reference, as though fully set forth herein, the allegations contained in the preceding paragraphs.

25. Pavon entered into a loan with Bancorp, secured by the subject real property.

26. Heritage claims to be the owner of the debt evidenced by a promissory note, for \$119,000, as the successor in interest to Bancorp.

27. Bancorp, and Heritage as its successor in interest, violated the provisions of the Federal TILA as well as California law as set forth above, including by failing to provide disclosure documents, providing false and misleading information as to the amount financed and by otherwise violating lending laws. These violations entitle Pavon to damages as alleged herein.

28. An actual controversy has arisen and now exists between Pavon and Heritage concerning their respective rights and duties in that Pavon contends that by failing to provide these disclosures and by providing false and misleading information, Pavon is entitled to actual damages.

29. In addition, Pavon seeks a judicial determination that Heritage, as the successor in interest to Bancorp, is entitled to collect the outstanding balance due on the promissory note that was secured by the second mortgage on the subject property.

30. Pavon requests a judicial determination of the parties' rights and duties as is necessary and appropriate at this time under the circumstances, and a declaration as to whether Heritage and Bancorp violated federal and state lending laws, and the amount owed, if any by Pavon to Heritage.

1  
2                   **FOURTH CLAIM FOR RELIEF**  
3                   **(Accounting)**

- 4  
5     31. Pavon realleges and incorporates by reference, as though fully set forth herein, the  
6     allegations contained in the preceding paragraphs.  
7  
8     32. On October 13, 2009, Pavon received a demand for payment from Heritage on loan number  
9     11722042 for the outstanding balance of \$79,013.99.  
10  
11    33. On November 11, 2009, Pavon received a Verification of Debt from Heritage, showing the  
12     outstanding balance to be the sum of \$118,570.72. The balance was increased, in less than one  
13     month by the sum of \$39,556.73.  
14  
15    34. Pursuant to the terms of the promissory note, monthly payments of \$1,099.68, were to be  
16     applied to principal and interest.  
17  
18    35. The amount of money due, if any, from Pavon to Heritage is unknown to Pavon and cannot  
19     be determined without an accounting.

20  
21       **WHEREFORE, Counterclaimants, Jose Eduardo Pavon and Jennifer Von Bima, pray as**  
22       **follows:**

- 23  
24  
25  
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27  
28     1. As to the First Claim for Relief:  
28        a. Damages according to proof;  
29        b. For attorney's fees according to proof;  
30  
31     2. As to the Second Claim for Relief:  
32        a. For Damages according to proof;  
33        b. For attorneys' fees according to proof;  
34        c. For Punitive and Exemplary Damages;  
35  
36     3. As to the Third Claim for Relief:  
37        a. For a determination of the rights of Pavon and Heritage;  
38  
39     4. As to the Fourth Claim for Relief:

- 1 a. For an order of accounting by Heritage as to the amount due, if any from Pavon;
- 2
- 3 5. As to all Claims for Relief:
- 4 a. Any further orders that the court deems proper.
- 5

6 Dated: April 7, 2010

Law Offices of Marilyn S. Yee

7 By Marilyn S. Yee

8 Marilyn S. Yee

9 Attorney for Defendants, Jose Eduardo Pavon  
And Jennifer Anne Von Bima

Marilyn S. Yee SBN 096249  
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Attorney for Defendants, Jose Eduardo Pavon and Jennifer Anne Von Bima

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Heritage Pacific Financial LLC,  
DBA Heritage Pacific Financial,  
A Texas Limited Liability Company.  
Plaintiff.

vs.

James Hague, Charlene Chao; Jeffrey  
Tomazin, Priscilla Tomazin; Maria Soila  
Carbajal, Ephraim Kiama, Evie Liwe, James  
Taylor, Remus Eppie, Patrick Ogden, Silvia  
Elizabeth Salmeron, Veronica Conklin, Emilia  
Villarreal, Moradali Amirinegar, Martha  
Rocha, Mina Shahab, Myra Popp Figueroa.  
Victor Bonilla, Leticia Valenzuela, Antonia  
Pedraza, Bonnie Rhea Scott, Alberto Pasillas.  
Jorge Velasco, Jennie Arismendez, Paul  
Radwich, Mary Pearson, Ronald Calvero, Jose  
Eduardo Pavon, Jennifer Anne Von Bima.  
Fred Ortiz, Jorge Mora, Sonia Navarro.  
Monique Heredia, Otila Murrietta, Gelenie  
Quiocho Amigable, Amanda Espinello.  
Claudia Tovar, Sergio Tovar, Bertha Cortes.  
Miguel Cortes Ferral, Jorge Siguenza, Blanca  
Rodas, Sean Wolfswinkel, Alfredo Jimenez.  
Eloisa Peneda, Levis Rodrigues, Monica  
Anguiano, Salomon Solis, Monique Huereque.  
Lourdes Velazques.  
Defendants

) Case No.SACV09-01466AG (RNBx)  
)  
) **THIRD PARTY COMPLAINT FOR**  
) **DAMAGES FOR:**  
)  
) **1. BREACH OF ORAL AGREEMENT**  
) **2. BREACH OF FIDUCIARY DUTY**  
) **3. FRAUD**  
) **4. CONSPIRACY TO DEFRAUD**

1  
2 Jose Eduardo and Jennifer Anne Von Bima, )  
3 Individuals, )  
4 )  
5 Third Party Plaintiffs )  
6 )  
7 Vs. )  
8 )  
9 Joaquin G. Serrano, Luz Maria Guzman, )  
10 Also known as Veronica Serrano, Winfred )  
11 Serrano, Ana Cristina Rojas, Miguel Mario )  
12 Gutierrez and Does 1 through 5, )  
13 )  
14 Third Party Defendants )  
15 )

16 COMES NOW, THIRD PARTY PLAINTIFFS, JOSE EDUARDO PAVON and JENNIFER  
17 ANNE VON BIMA, INDIVIDUALS, alleges damages and seeks equitable relief against,  
18 THIRD PARTY DEFENDANTS, AS FOLLOWS:

19 A. JURISDICTION AND PARTIES

- 20 1. At all times herein mentioned, Third Party Plaintiffs, Jose Eduardo Pavon and Jennifer Anne  
21 Von Bima, hereafter referred to as "Pavon" were residents of the County of Riverside.  
22  
23 2. Pavon is informed and believes and on that basis alleges, that Third Party Defendants,  
24 Joaquin G. Serrano, Luz Maria Guzman, also known as Veronica Serrano, Winfred Serrano,  
25 and Ana Cristina Rojas, hereafter referred to as "Serrano" were at all times herein mentioned  
residents of Los Angeles, California.  
26  
27 3. Pavon is informed and believes and on that basis alleges that at all times herein mentioned,  
28 Miguel Mario Gutierrez, hereafter "Gutierrez" was the mortgage agent, who secured the loan  
for Pavon, and was duly licensed under the laws of the State of California;

1       4. Pavon further alleges that this Third Party Complaint, arises out of the same transaction as  
2                  the main action concerning the property located at 2257 Riverdale Avenue, Los Angeles,  
3                  California 90031.  
4

5       **B. HISTORY OF THE CASE**

6       5. Pavon was contacted by his family members, Serrano, and asked to execute a loan for the  
7                  subject property. The lender, Metropolitan Bancorp, hereafter "Bancorp" was secured by a first  
8                  deed of trust for \$476,000, and a loan that is the subject of this action, for \$119,000 was secured  
9                  by a second deed of trust on the property.  
10

11       6. Pavon was advised by Serrano that he needed Pavon to be the borrower for the subject loan  
12                  and that the loan would be refinanced in six months in Serranos' name.  
13

14       7. Pavon did not reside in the subject property, but was seeking to assist Serrano, by securing the  
15                  financing. Serrano agreed to reside in the property, and to make all of the loan payments on the  
16                  first and second mortgages. Serrano further advised Pavon that the subject financing was for a  
17                  short term re-finance, and that a new loan would be placed on the property in 6 months, and that  
18                  Pavon would no longer be the borrower. After the escrow closed Pavon became aware that the  
19                  transaction was for the purchase of the subject property from Winfred Serrano, and Ana  
20                  Christina Rojas, the children of Joaquin G. Serrano and Luz Maria Guzman, and was not for a  
21                  refinance.  
22

23       8. Pavon executed a Uniform Residential Loan Application, Form 1003, that contained certain  
24                  financial information relating to their debt and income. The pages of the loan application were  
25                  changed after the application was executed by Pavon, specifically in the sections relating to  
26                  income, by the loan agent, Miguel Mario Gutierrez, with false information without Pavon's  
27  
28

1 consent and knowledge. Further the loan payments were to be made by Joaquin Serrano, and Luz  
2 Maria Guzman, who resided in the subject property.

3 9. Pavon submitted supporting documents for the loan application to the lender Bancorp and to  
4 Gutierrez, which included employment pay stubs, and bank statements.

5 **C. GENERAL ALLEGATIONS**

6 10. Pavon realleges, as though fully set forth herein, the allegations contained in paragraphs 1  
7 through 9 of this Third Party Complaint.

8 11. Pavon is informed and believes and on that basis allege that Gutierrez at all times herein  
9 mentioned was employed by or the agents of Serrano , and was acting within the course and  
10 scope of the agency or employment in doing the acts as alleged.

11 **FIRST CLAIM FOR RELIEF**  
12                   **(Breach of Oral Agreement**  
13                   **Against Serrano)**

14 12. Pavon realleges and incorporates by reference as though fully set forth herein, the allegations  
15 contained in paragraphs 1 through 11 of this Third Party Complaint

16 13. On or about November 1, 2006, Serrano requested Pavon's assistance to secure a loan, to  
17 finance the purchase of the subject real property.

18 14. Serrano and Pavon had an oral agreement in which Serrano was to reside in the property,  
19 make all loan payments, and to pay other expenses associated with the property, such as  
20 insurance, maintenance and property taxes. Loans were secured for a total of \$476,000 for the  
21 first mortgage and \$119,000 for the second mortgage, for a total of \$595,000.

22 15. Serrano failed to make the payments as agreed, and the property went into default. Pavon  
23 expended \$20,000 from personal funds in an attempt to avoid the foreclosure. Notwithstanding  
24 the efforts of Pavon, the real property was sold at a trustee's sale on or about May 15, 2008. The

1 main action was filed on December 11, 2009 to collect the unpaid balance of the second  
2 mortgage.

3 16. As a result of Serranos' breach of the oral agreement, Pavon has been damaged in an amount  
4 not yet ascertained.

5 17. Pavon has performed all acts as promised.

6 18. Serrano has failed and refused, and continues to fail and refuse, although demand has been  
7 made, to reimburse Pavon for the funds expended in connection with this loan.

8 19. Pavon is entitled to consequential damages resulting from Serranos' breach according to  
9 proof.

10  
11  
**SECOND CLAIM FOR RELIEF**  
**(Breach of Fiduciary Duty Against Gutierrez)**

12 20. Pavon realleges and incorporates by reference, as though fully set forth herein, the  
13 allegations contained in the preceding paragraphs.

14 21. At all times herein mentioned, Gutierrez was the loan agent who handled all documents  
15 needed to obtain the loan.

16 22. The amount of income did not total the sum of \$15,000, on the Uniform Loan Application  
17 when the application was executed by Pavon. Pavon submitted pay stubs and bank statements to  
18 Gutierrez to verify the correct figures.

19 23. Pavon is informed and believes and thereon alleges that Gutierrez, or his agents, modified the  
20 amount of Pavons' income on the application without Pavons' knowledge or consent.

21 24. Gutierrez, as the loan agent has a fiduciary duty to his clients to insure that the loan  
22 application, and supporting documents with accuracy and a standard of care.

23 25. Gutierrez breached his fiduciary duty by failing to submit accurate information concerning  
24 Pavons' income and assets.

25 26. Pavon was not advised of the error until this action was filed by Heritage Pacific Services,  
26 for a collection of the balance owed on the second mortgage.

27 27. As a result of Gutierrez's breach of fiduciary duty Pavon suffered damage.

28. The total damages suffered by Pavon is not known at this time, and Pavon is entitled to damages according to proof.

**THIRD CLAIM FOR RELIEF**  
**(Fraud)**  
**Against All Defendants**

29. Pavon realleges and incorporates by reference, as though fully set forth herein, the allegations contained in the preceding paragraphs.

30. Gutierrez had a duty to accurately and honestly disclose the material terms of the loan to the Pavon, and to make certain that Pavon understood the terms of the loan.

31. As alleged herein, the representations by Gutierrez and Serrano, made to Pavon to induce Pavon to enter the loan were false, and were made with the intent to harm Pavon and to profit from the misrepresentation.

32. The representations made to Pavon by Gutierrez and Serrano were material, and were intended to induce, and did induce, Pavon to enter into the loan transaction, so that Gutierrez and Serrano would profit.

33. At the time they made these representations, Gutierrez and Serrano knew the information concerning the loan application, and the reasons for the financing were false, misleading and/or concealed the truth

34. Pavon reasonably and justifiably relied upon these representations and omissions and was induced into executing the loan documents.

35. As a proximate result of the misrepresentations of Gutierrez and Serrano, Pavon has suffered, currently suffers, and will continue to suffer damages in an amount not yet ascertained.

36. Pavon is entitled to an award of punitive or exemplary damages due to the acts, omissions, and fraudulent misrepresentations of Gutierrez and Serrano as alleged herein, as their conduct was intentional, fraudulent, oppressive and malicious.

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2                   **FOURTH CLAIM FOR RELIEF**  
3                   **(Conspiracy to Defraud)**  
4                   **Against Gutierrez and Serrano**

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37. Pavon realleges and incorporates by reference, as though fully set forth herein, the allegations contained in the preceding paragraphs.

38. At all times herein mentioned, Serrano and Gutierrez falsely and fraudulently represented to Pavon that the use of Pavon's high credit score would be used for a short term loan in order that Serrano could refinance the subject real property.

39. Serrano and Gutierrez knew that the representations to Pavon were false.

40. The transaction of the subject real property in fact was a purchase, and not a refinance. Further, Serrano never intended to refinance the subject property in six months, and to remove Pavon as the borrower.

41. At all times herein mentioned, Serrano and Gutierrez willfully conspired to induce Pavon to enter into the subject loan transactions herein described.

42. The conspiracy of Serrano and Gutierrez was aimed at using Pavon's high credit score for their personal gain, and to misappropriate Pavon's money and credit rating.

43. All acts and conduct of Serrano and Gutierrez were willful and in furtherance of the conspiracy to defraud Pavon.

44. Pavon is entitled to an award of punitive or exemplary damages due to the acts, omissions, and conspiracy to defraud of Gutierrez and Serrano as alleged herein, as their conduct of was intentional, fraudulent, oppressive and malicious.

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28  
**WHEREFORE, Third Party Plaintiffs, Jose Eduardo Pavon and Jennifer Von Bima, pray as follows:**

1. As to the First Claim for Relief:

a. Damages according to proof

2. As to the Second Claim for Relief:

- 1 a. For damages according to proof;
- 2 3. As to the Third Claim for Relief:
  - 3 a. For damages according to proof;
  - 4 b. For exemplary damages;
- 5 4. As to the Fourth Claim for Relief:
  - 6 a. For damages according to proof;
  - 7 b. For exemplary damages.
- 8 5. As to all Claims for Relief:
  - 9 a. Any further orders that the court deems proper.

10 Dated: April 7, 2010

11 Law Offices of Marilyn S. Yee

12 By Marilyn S. Yee

13 Marilyn S. Yee  
14 Attorney for Defendants, Jose Eduardo Pavon  
15 And Jennifer Anne Von Bima

**PROOF OF MAILING**

I am a citizen of the United States and a resident of the county; I am over the age of 18 years of age, and not a party to the within entitled action; my business address is 29910 Murrieta Hot Springs Road, Suite G-533, Murrieta, California, 92563.

On April 13, 2010, I mailed the Notice of Motion to Set Aside Default, to the parties placing a true copy in a sealed envelope with the postage prepaid in the United States Mail at Murrieta, California, addressed as follows:

Brad A. Mokri  
Mokri & Associates  
1851 E. 1<sup>st</sup> Street, #900  
Santa Ana, California 92705

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed April 13, 2010 at Murrieta, California.

Marilyn S. Yee  
Marilyn S. Yee